

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	DETERMINATION
<b>ERIC S. BROWN AND IAN BROWN</b>	:	DTA NOS. 818187 AND
	:	818188
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 1997 through November 30, 1999.	:	

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Petitioner Eric S. Brown, 547 West 49<sup>th</sup> Street, New York, New York 10019, and petitioner Ian Brown, 69 Windmill Road, Armonk, New York 10504-2833, each filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1997 through November 30, 1990.

A consolidated hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 21, 2001 at 10:45 A.M., with all briefs to be submitted by January 4, 2002, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Michael A. Zimmerman, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

***ISSUE***

Whether petitioners had sufficient involvement in and control over the activities of a number of different entities which operated parking garages so as to be considered persons responsible to collect and remit sales and use taxes on behalf of such entities pursuant to Tax Law §§ 1131(1) and 1133(a).

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued some ten notices of determination to petitioner Eric S. Brown assessing sales and use taxes due as follows:

<u>Assessment ID #</u>	<u>Sales Tax Quarterly Period</u>	<u>Tax Amount</u>	<u>Corporation</u>
L-017649104	03/01/99 - 05/31/99	\$15,494.12	Greenwich
L-017649105	12/01/98 - 02/28/99	14,514.36	Greenwich
L-017649106	09/01/98 - 11/30/98	49.02	Greenwich
L-017764222	09/01/99 - 11/30/99	12,137.73	Smart 19
L-017764223	06/01/99 - 08/31/99	8,846.87	Smart 19
L-017764224	03/01/99 - 05/31/99	9,938.18	Smart 19
L-017764225	12/01/98 - 02/28/99	11,327.13	Smart 19
L-017764230	09/01/99 - 11/30/99	31,405.71	Smart 66
L-017764231	06/01/99 - 08/31/99	21,448.68	Smart 66
L-017764232	03/01/99 - 05/31/99	29,786.51	Smart 66

The first three notices listed above are dated April 27, 2000, while the remaining seven notices are dated May 11, 2000. Each of the notices claims that petitioner Eric S. Brown was an officer or person responsible to collect and remit sales and use taxes on behalf of the above-named corporations, pursuant to Tax Law § 1138(a), § 1131(1) and § 1133(a). The dollar amounts shown above represent tax only, and are exclusive of penalty (per Tax Law § 1145 [a][1]) and interest amounts which were also assessed as due under each of the notices.

2. The Division issued some ten notices of determination to petitioner Ian Brown assessing sales and use taxes due as follows:

<u>Assessment ID #</u>	<u>Sales Tax Quarterly Period</u>	<u>Tax Amount</u>	<u>Corporation</u>
L-017649108	03/01/99 - 05/31/99	\$15,494.12	Greenwich
L-017649109	12/01/98 - 02/28/99	14,514.36	Greenwich
L-017649110	09/01/98 - 11/30/98	49.02	Greenwich
L-017764226	09/01/99 - 11/30/99	12,137.73	Smart 19
L-017764227	06/01/99 - 08/31/99	8,846.87	Smart 19
L-017764228	03/01/99 - 05/31/99	9,938.18	Smart 19
L-017764172	09/01/99 - 11/30/99	13,751.35	Agree
L-017764173	06/01/99 - 08/31/99	12,144.83	Agree

L-017764174	03/01/99 - 05/31/99	12,944.96	Agree
L-017764175	12/01/98 - 02/28/99	10,974.16	Agree

The first three notices listed above are dated April 27, 2000, while the remaining seven notices are dated May 11, 2000. Each of the notices claims that petitioner was an officer or person responsible to collect and remit sales and use taxes on behalf of the above-named corporations, pursuant to Tax Law § 1138(a), § 1131(1) and § 1133(a). The dollar amounts shown above represent tax only, and are exclusive of penalty (per Tax Law § 1145[a][1]) and interest amounts which were also assessed as due under each of the notices.

3. On April 9, 2001, the Division filed motions seeking summary determination against each of the petitioners on the basis that petitioners had not timely challenged the foregoing notices. By an Order dated August 9, 2001, the Division's motions were granted with respect to the three notices issued to each petitioner relating to the corporation Greenwich, and the petitions were dismissed insofar as they contested such notices. The Order denied the Division's motions with respect to the remaining seven notices issued against each petitioner. As a result, this proceeding concerns such remaining 14 notices of determination (which are all of the notices listed above except those relating to the corporation Greenwich).

4. Smart Parking, Inc., is a Delaware corporation. Petitioner Eric S. Brown served as president, chief executive officer and chairman of the board of Smart Parking, Inc., while petitioner Ian Brown was its secretary, treasurer, chief operating officer and assistant chairman of the board. As of December 23, 1997, each petitioner owned 37.5 percent of the issued and outstanding stock of Smart Parking, Inc.

5. Smart Parking, Inc. is, in turn, the sole shareholder of several subsidiary corporations which operate parking lots, including Agree Parking Corp. ("Agree"), Greenwich Parking Corp. ("Greenwich"), Smart 19 Parking Corp. ("Smart 19") and Smart 66 Parking Corp. ("Smart 66").

6. Each of the petitioners pledged his shares of stock in Smart Parking, Inc. as collateral for a 20 million dollar loan from Lone Star Securities Fund, LLC to Smart Parking, Inc.

7. The notices of determination listed above which were issued to Eric S. Brown and which remain in contest were issued to him as a person responsible to remit taxes on behalf of the various listed entities. These notices were issued following the submission of sales tax returns without remittance of taxes by such entities. Evidence submitted at hearing reveals the following:

-Eric S. Brown signed sales tax returns on behalf of Smart 19 as "Pres" for the sales tax quarterly period June 1, 1999 through August 31, 1999 and as "VP" for the sales tax quarterly period September 1, 1999 through November 30, 1999. The returns in evidence reflect the handwritten address, "575 Washington Street, New York, NY 10014" and the telephone number "(212) 929-0099."

-Eric S. Brown signed check number 1041, drawn on Smart 19's checking account, for sales tax remittance for the period June 1, 1996 through August 31, 1996 (this check was returned for insufficient funds). Again, the returns in evidence reflect the handwritten address "575 Washington Street, New York, NY 10014" and the telephone number "(212) 929-0099."

-Eric S. Brown signed sales tax returns on behalf of Smart 66 as "Pres" for the sales tax quarterly period June 1, 1999 through August 31, 1999 and as "VP" for the sales tax quarterly period September 1, 1999 through November 30, 1999.

-Eric S. Brown signed check number 1268, drawn on Smart 66's checking account, for sales tax remittance for the period June 1, 1996 through August 31, 1996 (as above, this check was returned for insufficient funds).

-Eric S. Brown signed two promissory notes, as president of Smart Parking, Inc., between Smart Parking, Inc. and Lone Star Securities Fund, LLC. Eric S. Brown also signed a Stockholder's Pledge Agreement as president of Smart Parking, Inc., to provide collateral securing the prompt repayment of the promissory notes.

-Eric S. Brown was paid \$349,999.92 by Smart Parking, Inc. for calendar year 1998. Form W-2 issued in connection with this payment lists Eric S. Brown's employer's address as "575 Washington Street, New York, NY 10014."

8. The notices of determination which were issued to Ian Brown and which remain in contest were issued to him as a person responsible to remit taxes on behalf of the various listed entities. These notices were issued following the submission of sales tax returns without the remittance of sales taxes by such entities. Evidence submitted at hearing reveals the following:

-Ian Brown signed sales tax returns on behalf of Agree as “VP” for the sales tax quarterly period September 1, 1999 through November 30, 1999 and, without specifying a title, for the sales tax quarterly period June 1, 1999 through August 31, 1999. The returns in evidence reflect the handwritten address “575 Washington Street, New York, NY 10014” and the telephone number “(212) 929-0099.”

-Ian Brown signed check number 945, drawn on Smart Parking, Inc.’s checking account, for sales tax remittance for Agree for the period June 1, 1996 through August 31, 1996 (this check was returned because the account was closed).

-Ian Brown signed a Disagreement with [audit] Findings (“Form DTF 968.1”) on behalf of Agree for the period September 1, 1998 through November 30, 1998. He also signed a Disagreement with [audit] Findings on behalf of Smart 19 for the period September 1, 1998 through November 30, 1998.

-Ian Brown was paid \$349,999.92 by Smart Parking, Inc. for calendar year 1998. Form W-2 issued in connection with this payment lists Ian Brown’s employer’s address as “575 Washington Street, New York, NY 10014.”

9. Neither of the petitioners, nor any other witnesses on their behalf, appeared at hearing to give testimony concerning these matters.

### ***CONCLUSIONS OF LAW***

A. The issue in this case concerns petitioners’ potential liability for unpaid sales and use taxes, and attendant penalties. Exposure to such liability arises under Tax Law § 1133(a), which states that:

Every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .

Tax Law § 1131(1), in turn, defines “persons required to collect tax” and a “person required to collect any tax imposed by this article [Article 28]” to include any officer or employee of a corporation who, as such officer or employee, is “under a duty to act for such corporation in complying with any requirement of [Article 28].”

B. The mere holding of corporate office does not, per se, impose sales tax liability upon an officeholder (*see, Vogel v. New York State Dept. Of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427, 430; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed* 214 AD2d 857, 625 NYS2d 343, *lv denied* 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (*see, Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacey v. State*, 82 Misc 2d 181, 368 NYS2d 448; *Chevlowe v. Koerner, supra*, 407 NYS2d at 429; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner’s regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation;

authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (*Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536,538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. Of Taxation & Fin.*, *supra*, 413 NYS2d at 865; *Chevlowe v. Koerner*, *supra*, 407 NYS2d at 429; *Matter of William D. Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex*, *supra*).

C. In order to prevail, each “petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own” (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998).

D. As a starting point, it is clear that petitioners bear the burden of proof to overcome the presumed correctness of the assessments (*Matter of Mera v. Tax Appeals Tribunal*, 204 AD2d 818, 611 NYS2d 716; *Matter of Blodnick v. State Tax Commn.*, *supra*.). In turn, upon review of the entire record, it becomes clear that petitioners have not met their burden and were properly held responsible for the sales tax obligations in issue.

E. As set forth in Finding of Fact “4”, and as detailed in Finding of Fact “7”, pertaining to petitioner Eric S. Brown, and Finding of Fact “8”, pertaining to petitioner Ian Brown, each petitioner owned 37.5 percent of the stock and held, between them, all of the significant officer titles within Smart Parking, Inc., the entity which in turn entirely owned the subsidiary corporations whose liabilities are assessed against petitioners herein. Each petitioner received a significant amount of wage compensation from Smart Parking, Inc., which listed the same address and telephone number as the other entities. Moreover, and directly to the point, each petitioner signed sales tax returns, sales tax remittance checks, and other documents as officers

of the specific entities whose liabilities are assessed against each of the petitioners (Smart 19 and Smart 66 in the case of Eric S. Brown, and Agree and Smart 19 in the case of Ian Brown). As noted, neither of the petitioners appeared at hearing to provide testimony in explanation of the facts and circumstances surrounding these matters, or to attempt to explain away the impact of the foregoing indicia of their significant involvement in and responsibility for the affairs of the subject entities. Simply put, the record does not support the conclusion that either petitioner did not have or could not have exercised sufficient authority and control over corporate affairs so as to be excused from responsibility for the tax obligations of such entities (*see, Matter of Shah*, Tax Appeals Tribunal, February 25, 1999).

F. The principal arguments against responsibility advanced by petitioners are that the Division did not prove petitioners' status as responsible persons, that the Division should have pursued other persons who were allegedly responsible shareholders or officers of the corporations, and that sufficient funds exist within the corporations to satisfy the liabilities in question. In addition, petitioners' representative challenged certain of the documents introduced in evidence by the Division. These arguments against liability are unavailing, as are petitioners' challenges to the documents. As noted earlier, it is petitioners and not the Division who bear the burden of overcoming the presumed correctness of the assessments. In this case, petitioners have provided nothing to dispute or overcome the Division's evidence that they were significantly involved in, if not entirely in charge of, the operations of the entities in issue. As to the challenges to the Division's documentary evidence, petitioners' representative was afforded the opportunity to counter the asserted authenticity and accuracy of such documents and the signatures thereon, but offered no documentary or testimonial evidence, either at or after the hearing, to support such challenges. Furthermore, the Division is under no obligation to pursue



other allegedly responsible persons before proceeding against petitioners (*see, Matter of Risoli v. Commissioner of Taxation and Finance*, 237 AD2d 675, 654 NYS2d 218). Finally, petitioners' assertion that sufficient funds exist to pay off the assessments at issue is not only unsupported by any evidence but is entirely irrelevant to the question of petitioners' status as persons responsible for the payment of such assessments. Simply put, the record does not support the conclusion that petitioners did not have or could not have exercised sufficient authority and control over corporate affairs (*see, Matter of Harshad Shah, supra*). Accordingly, each petitioner was properly held responsible for the sales tax obligations, including the accompanying penalties, imposed with regard to each corporation's nonpayment of sales taxes for the periods in issue.

G. The petitions of Eric S. Brown and Ian Brown are hereby denied and the notices of determination enumerated in Findings of Fact "1" and "2" are sustained.<sup>1</sup>

DATED: Troy, New York  
June 6, 2002

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>1</sup> As noted in Finding of Fact "3", the petitions were previously dismissed insofar as they challenged the six notices issued to petitioners and pertaining to the corporation known as Greenwich.